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EQUITY CROWDFUNDING INDUSTRY REGULATIONS IN MALAYSIA AND INDONESIA: PROSPECTS AND CHALLENGES DURING THE COVID-19 PANDEMIC

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ABSTRACT

Equity crowdfunding (ECF), also known as crowd-investing or investment crowdfunding, is a way of boosting capital used by start-ups and early-stage companies. Fundamentally, ECF offers the company's securities to potential investors in exchange for their investment. As a result, each investor is authorized to a share in the company proportionate to their financing. This paper discusses the ECF industry regulations in Malaysia and Indonesia in terms of its prospects and challenges during the COVID-19 pandemic through doctrinal research using the conventional legal method. Critical and analytical approaches were used to achieve its objectives. The findings showed that ECF has seen a growth of over 170 percent in new accounts registered in Malaysia, with 65 percent of them being retail investors. There is a great demand from individual and retail investors who are looking to invest in various investment products and services made accessible to them. The Capital Markets

and Services Act 2007 plays an important role to provide good governance of ECF business in Malaysia. Further, the Guidelines on Recognized Markets (GRM 2020) (Item 1.01 GRM) and section 15 (g) of the Securities Commission Act 1993 clarifies the function of the Securities Commission to regulate ECF activities and protect the interests of the parties involved, especially investors. In Indonesia, the main regulator of ECF is the Financial Services Authority and the new ECF law is the Financial Services Authority Regulation Number 57/POJK.04/2020 concerning Securities Crowdfunding. The regulation aims to extend the scope of the crowdfunding which includes debt-based securities and *sukuk*. The prospects of ECF business in both countries are great especially in the era of the pandemic because the fintech, which has led to new investment products and services, is a vital force that helps democratize investments and will continue to increase as investors become more educated and informed. In terms of the ECF law, comparatively, it is different in terms of the governance, process and procedure, types of investors, etc. which are applicable in both Malaysia and Indonesia.

Keywords: Equity crowdfunding, platform operator, digital business.

INTRODUCTION

On Thursday, 30 January 2020, the World Health Organization Director-General made a final decision on the determination of a Public Health Emergency of International Concern (PHEIC) of the outbreak of the 2019 novel Coronavirus (2019-nCoV) (WHO, 2020c), which is now known as the COVID-19 pandemic. Based on the report of the Chinese authorities' determination that the outbreak was caused by a novel coronavirus on 9 January 2020, the first recorded case outside the People's Republic of China was reported in Thailand on 13 January 2020 (WHO, 2020b). Subsequently, COVID-19 was transmitted worldwide including Malaysia and Indonesia.

The new SARS-CoV-2 virus that caused the disease COVID-19 first arrived on the shores of Malaysia on 25 January 2020. A month later, case numbers rose to 22 positive cases in February 2020 and following that, case numbers ballooned 20 times to 428 cases by mid-March 2020. To stem the transmission, Malaysian authorities imposed a two-week Movement Control Order (MCO) on 18 March

2020. Businesses and facilities that were considered non-essential were closed. Interstate travel was heavily restricted. Public sports, religious programmes and events were postponed. A year later, the pandemic situation in Malaysia continued to increase in number. As of 27 February 2021, the total number of active cases for Covid-19 in Malaysia was 27,028 and the total number of confirmed cases was 293,315. The statistics showed that the total number of recovered cases was 270,166 (90.56%) and the total number of deaths was 1,121 (0.38%) (National CPRC Ministry of Health, 2021).

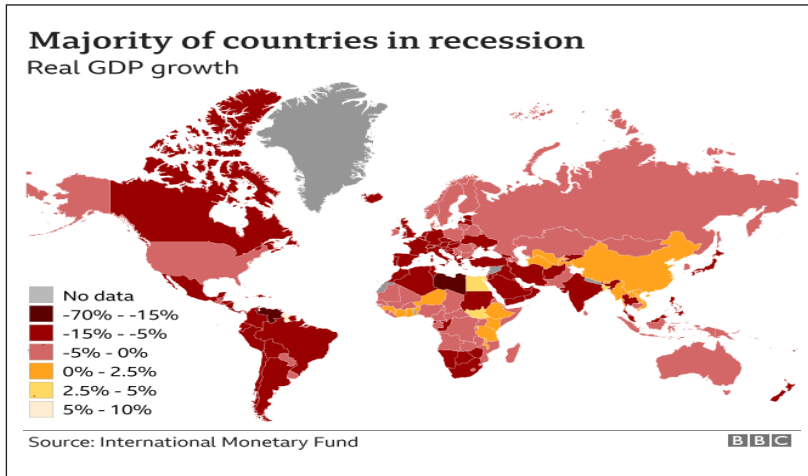
The Indonesian President announced the first two confirmed COVID-19 cases in Indonesia (WHO, 2020a) on 2 March 2020. Eventually, COVID-19 spread to all 34 provinces in Indonesia on 10 April 2020, with 3,512 positive cases (Mukaromah & Ratriani, 2020). As of 6 March 2021, COVID-19 cases in Indonesia reached 1,373,836 confirmed cases, with 147,172 cases in care, 1,189,510 cases cured, and 37,154 deaths (KawalCovid19, 2021; Komite Penanganan Covid-19 dan Pemulihan Ekonomi Nasional, 2021; Mashabi, 2021).

In response to the pandemic, the Indonesian authorities issued Presidential Regulation Number 21 Year 2020 concerning Large-Scale Social Restriction to Accelerate the Handling of the Corona Virus Disease 2019 (COVID-19). The regulation had affected several sectors, including the economy. Yamali and Putri, (2020) asserted that COVID-19 impacted the economic sector resulting in inflation and losses in the tourism sector which was reflected in a decrease in hotel occupancy rates. In Klaten and Wonogiri: Klepu Market, Kalikotes Market, and Wonogiri City Market suffered economic and social losses due to the COVID-19 pandemic. As the local government implemented large-scale social restriction policy, the traders suffered a 50 percent loss due to the decrease in the number of customers to the markets (Azimah et al., 2020).

There is no denying that this pandemic had severely impacted both Malaysia and Indonesia in the context of macroeconomics and the economic well-being of the people. The main disruption to the Malaysian and Indonesian economies were due to two factors, the first was the spillover effect from the effects of the coronavirus abroad, and the second was the situation in the respective countries as a result of the enforcement of movement controls imposed. An overview of the global recession in 2020 can be seen in Figure 1.

Figure 1

Overview of World Recession in 2020



ECF is an act in which individuals invest in a start-up company that is exempt from the stock market list. If the result goes well, the shareholder will be given partial control of the business and able to earn profit. Back in those days, only the wealthy and businessmen were willing to invest in start-ups. In democratizing the investment procedure, the ECF platform has helped to open the gates to investors directly, leading to a ‘crowd’ and thus ECF. The crowdfunding framework offers an interesting new platform in which to re-examine a question in view of the pronounced profits and extreme possibilities of ECF along with the shifting regulatory landscape globally: Is the model of law development viable in enhancing or impeding the development of the ECF industry?

In Malaysia, the ECF is an alternative fundraising site controlled by Malaysia’s Securities Commission (SC). Currently, there are 10 registered ECF such as Leet Capital, Ata Plus, Pitchin, Ethis Ventures, Fundnel and others. The top Malaysian companies involved in equity crowdfunding (ECF) are ATA PLUS Sdn Bhd, Netrove Ventures Group, and Alix Global Sdn Bhd. In Malaysia, the ECF statistics as of 31 December 2019 showed that the distribution by fundraising amount which ranged from RM500,000 and less (50%), >RM500,000 to RM1.5 million (27%) and >RM1.5 million to RM3 million (23%). It consisted of 80 successful campaigns, with RM73.74 million raised

and involved 77 successful issuers (Securities Commission Malaysia, 2020). This has shown that the ECF business has become one of the new investment sources in Malaysia.

The SC has enacted new rules with regard to registration of ECF platforms including good governance guidelines for ECF platform operators. This provision is contained in Section 377 of the Capital Market Services Act 2007 (CMSA) read in conjunction with CMSA Subdivision 4, Part 2, Part II and the publication of the Recognized Markets Guidelines (GRM 2020) (Item 1.01 GRM). Section 15 (g) of the Securities Commission Act 1993 (SCA 1993) that states that the objective of this regulation is to observe the activities of the ECF and protect the well-being and rights of the parties involved, particularly investors. The ECF platform operator must meet the requirements in the GRM, before the SC can issue an ECF license (Item 2.01 GRM). Following the launching of ECF regulations, Liz (2015) reported that the SC and registered ECF platforms have executed various efforts to inform the public and entrepreneurs about alternative financing of companies.

In the case of Indonesia, in 2018 before the pandemic, the Indonesian authorities through the Financial Services Authority (hereinafter referred to as FSA) issued FSA Regulation Number 37/POJK.04/2018 concerning ECF. The regulation is aimed to provide an alternative funding to society by ECF method. ECF focuses on collecting funds from society as investors by offering the shares of a company. Under the ECF FSA Regulation, a company status is termed as a limited liability company (hereinafter as referred as LLC).

During the COVID-19 pandemic, on 11 December 2020, FSA substituted the FSA Regulation concerning Equity Crowdfunding to FSA Regulation Number 57/POJK.04/2020 concerning Securities Crowdfunding (hereinafter referred to as SCF). The main purpose of the regulation is to extend the scope of the crowdfunding, from limited only by offering “shares” to offering “securities” in a broader sense, which includes debt-based securities and *sukuk*; as the main target of the SCF FSA Regulation is broader. Previously, the issuer company was a LLC and could offer “shares”; however, under the new SCF 2020 FSA Regulation, the issuer company shall be a business entity which is not limited only to LLC.

The SCF mechanism is provided by an operator. The operator must be

an Indonesian legal entity which is responsible to provide, manage and operate the crowdfunding. As of now, there are three SCF operators (which were previously ECF platforms) in Indonesia: Santara, Bizhare, and CrowdDana. Prior to the issuance of the SCF FSA Regulation, the signing of the services agreement between the operators and the Indonesian Central Securities Depository was officially executed in the middle of the COVID-19 pandemic, with: Santara on 6 March 2020, Bizhare on 27 March 2020, and CrowdDana on 19 August 2020. (Indonesian Central Securities Depository, 2020, 2021).

On 4 January 2021, the Indonesian authorities officially launched the SCF which is expected to be a technology-based alternative funding for societies especially small and medium enterprises (SMEs). There are 23 operator candidates. The Indonesian government has urged investors as well as the young generation to contribute in SCF (Intan & Rahmawati, 2021). In accordance with the physical distancing policy, there is limited physical movement. Thus, money which is usually spent on ‘moving’ activities such as spending on consumption could be transferred to electronic securities trading.

This paper focuses on the nature of the ECF and the role of its respective regulations in Malaysia and Indonesia; its prospects and challenges during the COVID-19 pandemic and whether it is a boon or bane to the ECF industry.

LITERATURE REVIEW

Globally, the effect of the COVID-19 pandemic on the economy, education, social affairs and other sectors has been quite devastating. This can be seen in the education sector with the closure of educational institutions and many small and medium companies especially in the food, retail and entertainment sectors. Furthermore, it also uncovered the inability of certain governments or the reluctance of leaders to grant incentives, introduce economic measures and support to address rising unemployment rates, volatile small businesses and severely affected economic sectors. According to Dawson and Fouksman (2020) when support was evident, for example in the case of South Africa, the inadequacy of one-time emergency income replacement funds has mooted awareness of the long-term consequences of income insecurity and inequality, chronic unemployment and systemic inequality. In

South Africa, even before the virus hit badly, the unemployment rate in the country was a shaking 29 percent (Bronkhorst, 2020). It was predicted following the closure of most economies, that unemployment rates would reach 50 percent (Charles, 2020). In comparison, by the end of April 2020, 30 million Americans had filed for unemployment in the United States, increasing the unemployment rate from 4 to 15 percent. Similarly in Canada, unemployment was at 13 percent, 9 percent in the U.K., 8.4 percent in Italy and 5.8 percent in Germany (Kretchmer, 2020).

Throughout the pandemic, GoFundMe in the United States had seen a sharp increase in requests for financial support during the COVID-19 outbreak. Shortly after the World Health Organization (2020) announced a world-wide epidemic, 35,000 new COVID-related public funding campaigns were launched on GoFundMe. In mid-March 2020 there was a significant jump of about 60 percent in campaigns run by ECF platforms.

There are strongly pronounced potential benefits linked to ECF. Entrepreneurs may access the money they need to make it easier for their company to thrive, as compared to the situation before which their company failed to get financial support from banks, angel investors, or venture capitalists. Indeed, several enterprises could not have worked if they had not been able to raise funds by crowdfunding. There were 39 ECF platforms from all styles of crowdfunding models worldwide, representing 7.3 percent of the 452 platforms. In addition, a total of US\$88 million was obtained from ECF in 2011 and from all platforms and other crowdfunding models, a total of US\$1441 million. (Ahlers et al., 2012; Crowdfunding Industry Report 2012).

In selected Organisation for Economic Co-operation and Development (OECD) countries around the world, such as, the Netherlands, the United Kingdom, France, Ireland, Australia, and Switzerland, entrepreneurs managed to build up capital by selling their shares in companies via crowdfunding or by making open calls to investors through Internet portals. Donations, rewards-based, and lending are other examples of crowdfunding sites (for a description, refer Agrawal et al., 2011; Ahlers et al., 2012; Belleflamme et al., 2010, 2013; Bradford, 2012; Burtch et al., 2012; Griffin, 2012; Mollick, 2012; Schwienbacher & Larralde, 2013).

In Canada crowdfunding is governed under ECF law. The latest

rules regarding ECFs are regulated under rule NI 45-110 which facilitates start-up companies to get funding for their businesses and activities. This is to increase the individual investment limit in connection with any distribution subject to crowdfunding exemption and increase the maximum sum that can be raised in any 12-month period from \$500,000 to \$1.5 million (Morin et al., 2021). The belief that a country's legal system's flexibility supports access to finance is backed by empirical evidence (Beck et al., 2005; Cumming & Johan, 2008). Nevertheless, it is inconclusive, whether securities laws should be flexible to mandate demands to allow crowdfunding.

Among the ECF-related challenges for example, through crowdfunding, an entrepreneur can waste revenue or increase equity capital by reducing equity holdings held by investors (public) and issuing more shares to himself. In this situation, entrepreneurs basically have to get more shares and not to invest the money earned in suitable projects. Therefore, to minimize such risks, it is necessary to impose certain conditions on entrepreneurs, platform operators and investors.

In Malaysia, according to Wasiuzzaman (2021), investors in ECF need adequate disclosure of information and regulations to lower the risk of their investments in ECF projects. Further, Wasiuzzaman's (2021) findings showed that the quality of perceived information has a negative impact on risk of perceived investment. Regulation has a weak impact on risk of perceived investment. The relationship between information quality and risk is moderated by regulations. According to a study by Rosadi (2015) the rapid development of fintech in Indonesia, has raised concerns about the legal protection of its users because there are no clear regulations governing fintech. Whether it is related to privacy protection issues or the data privacy of users who register themselves in online platforms. Therefore, the issue of privacy protection and data privacy has become an urgent agenda in Indonesia.

RESEARCH METHODOLOGY

Research Design: This study is a doctrinal research which adopted the conventional legal method. In particular, traditional or conventional legal methods can be divided into four, namely the philosophical,

historical, comparative, and critical and analytical method. In order to achieve its objectives, two techniques were used—critical and analytical method. The technique of interpretation of statutes was employed which consisted of the literal rule, golden rule, mischief rule and purposive approach. Here, the provisions relating to crowdfunding legislations were analyzed. Secondly, the doctrine of judicial precedent was also applied to analyze cases related to crowdfunding. Additionally, a comparative legal method was used as this research involved comparative legal analysis of Malaysia and Indonesia. Comparative analysis was conducted between both countries because these are model countries in ASEAN which have adopted two different laws, common law (Malaysia) and civil law (Indonesia).

Research Scope: The legal documents referred in this research in the context of Malaysia included the CMSA 2007, Securities Commission's Guidelines on Regulation of Markets, the Companies Act 2016 and other relevant laws. As for Indonesia, among others, primary legal sources included the Indonesian Civil Code, Law Number 19 of 2016 concerning amendments to Law Number 11 of 2008 concerning information and electronic transactions, Law Number 21 of 2011 concerning the financial services authority, Law Number 9 of 1961 concerning fund raising, Law Number 8 of 1995 concerning capital market, Law Number 40 of 2007 concerning LLC and Law Number 20 of 2008 concerning micro, small, and medium enterprises.

Types of data: The source of data consisted of primary data and secondary data. The primary data for this study were the statutes, regulations, rules, guidelines and cases relating to crowdfunding. The secondary data comprised books, legal documents, and articles from journals and online resources. Data were collected from the Sultanah Bahiyah Library in Universiti Utara Malaysia, Ahmad Dahlan University Library in Indonesia and also from other online databases.

Data Analysis: Generally, the primary and secondary data were analyzed using content analysis; specifically, the provisions relating to ECF under the Malaysian Capital Markets Act 2007, Securities Commission's Guidelines on Regulation of Markets, the Companies Act 2016 and other relevant laws. As for Indonesia, the primary legal sources was the main or binding legal substance that included among

others the Indonesian Civil Code, Law Number 19 of 2016 concerning amendments to Law Number 11 of 2008 concerning information and electronic transactions, Law Number 21 of 2011 concerning the financial services authority, Law Number 9 of 1961 concerning fund raising, Law Number 8 of 1995 concerning capital market, Law Number 40 of 2007 concerning LLC and Law Number 20 of 2008 concerning micro, small, and medium enterprises. Other relevant laws were analyzed using interpretation of statutes techniques. While, court cases related to ECF were analyzed using the doctrine of judicial precedent. The descriptive analysis was carried out with the purpose of stating the rules and principles of the law regarding ECF. Analytical analysis was employed to thoroughly investigate, and evaluate every aspect of the factual data in the study.

FINDINGS

Law and Regulation of ECF in Malaysia and Indonesia

Malaysia

The main objective of the ECF law introduced by the SC serves as protection of the integrity of the Malaysian capital markets and also ensuring adequate safeguard for retail investors of ECF businesses. Malaysia is the earliest country in Southeast Asia, with distinct regulations for ECF and peer-to-peer financing platforms (Azrina Azmel, 2021).

The ECF law provides that the ECF platform must comply with registration provisions, terms and conditions. In addition, as an approved Recognized Market Operator (RMO), they shall fulfill the obligations and responsibilities as provided by the stipulated laws and regulations. The SC is responsible for: setting fundraising limits, reviewing platform status, ensuring that compliance is implemented, regulating termination or cancellation matters, reporting and transparency standards. ECF operators are allowed by the SC to set a percentage on the funds raised as platform fees in accordance to the ECF Guidelines.

ECF investors are divided into three categories namely sophisticated,

angel and retail investors. Each of these categories of investors has an investment limit and is required to declare the category they belong to before the investment is executed. Substantive laws governing ECF businesses in Malaysia include the CMSA 2007, GRM 2020 and the Companies Act 2016. Legal protection for ECF participants (issuers, ECF operators and investors) in Malaysia are stipulated under various statutes and guidelines i.e. the CMSA 2007, Companies Act 2016, SCA 1993 and GRM 2020.

The new rules in governing ECF pertaining to platform registration has been introduced by Malaysia's SC as stipulated in section 377 of the CMSA 2007. Under this section, the SC has been entrusted the power to issue guidelines and practice notes which are related to ECF i.e. the GRM 2020. The same goes for the provision of good governance; thus section 377 must be read together with Subdivision 4, Division 2, Part II of CMSA 2007 and the GRM 2020 (Item 1.01 GRM). Section 377 of CMSA 2007 stipulates that the SC has the authority to revoke, vary, revise or amend wholly or partially any guidelines and practice notes issued. The SC is authorized to take any one or more of the actions as stated in sections 354, 355 (only for derivatives exchange and clearing house) or 356 of the CMSA 2007 as it thinks fit on any person who violates or fails to follow any guideline or practice note issued.

The basic requirements regarding the business entity of the ECF operator is that the company must be established in Malaysia. This is in accordance with GRM 2020. Similarly, the issuer must be a registered entity under the Companies Act 2016. The ECF platform operator must be a locally incorporated private company and of limited liability partnerships (excluding exempt private companies). There are entities which are prohibited from raising funds through an ECF platform namely:

“a commercially or financially complex structures (i.e. investment fund companies or financial institutions); public-listed companies and their subsidiaries; companies with no specific business plan or its business plan is to merge or acquire an unidentified entity (i.e. blind pool); companies other than a micro fund that propose to use the funds raised to provide loans or make investments in other entities; companies other than a micro fund with

paid-up share capital exceeding RM5 million; and any other type of entity that is specified by the SC (GRM 2020).”

As for ECF operators, new requirements for the purpose of registration have been inserted into section 34 of the CMSA 2007. In relation to the duties of ECF operator in this context, section 36 of the CMSA 2007 provides that a ECF operator shall:

“(a) comply with any direction issued by the Commission, whether of a general or specific nature, and the recognized market operator shall give effect to such directions; and (b) provide such assistance to the Commission, or to a person acting on behalf of or with the authority of the Commission, as the Commission or such person reasonably requires.”

While section 36A provides on the withdrawal of registration. The provision states that:

“(1) Subject to subsection (4), where the Commission is satisfied that it is appropriate to do so in the interest of the investors, in the public interest or for the maintenance of an orderly and fair market, the Commission may, by notice in writing, withdraw the registration with effect from a date that is specified in the notice.”

In the notice in subsection (1), the SC, should declare the grounds of withdrawal, however, the SC should not exercise its power in the following situation:

“Under subsection (1) in relation to a recognized market operator that has been registered under subsection 34(1) unless it has given the recognized market operator an opportunity to be heard. Any withdrawal of registration made under this section shall not operate so as to (a) avoid or affect any agreement, transaction or arrangement entered into by the recognized market operator whether the agreement, transaction or arrangement was entered into before or after the withdrawal of the registration under subsection (1); or (b) affect any right, obligation

or liability arising under such agreement, transaction or arrangement.”

Under Chapter 13 of the GRM 2020, there are three entities involved in the ECF business i.e. (i) ECF operator means an Recognized Market Operator (RMO) who operates an ECF platform and registered with the SC; (ii) issuer means a person who is the host of an ECF platform and offers its shares on the ECF platform; and lastly the investors as defined by the GRM 2020 “is a person who invest in any issuer hosted on the ECF platform, subject to the following limits –(a) Sophisticated investors: no restrictions on investment amount; (b) Angel investors: a maximum of RM500,000 within a 12-month period; and (c) Retail investors: a maximum of RM5,000 per issuer with a total amount of not more than RM50,000 within a 12-month period.”

The threshold of funds raised from ECF platform in accordance to paragraph 13.19:

“An issuer may only raise, collectively, a maximum amount of RM10 million through ECF platforms in its lifetime, excluding the issuer’s own capital contribution or any funding obtained through a private placement exercise.”

In ensuring the RMO fulfil its responsibility, the obligations are specified in chapter 6 of the GRM 2020, that an ECF operator must:

“(a) carry out a due diligence exercise on prospective issuers planning to use its platform; (b) ensure the issuer’s disclosure document lodged with the ECF operator is verified for accuracy and made accessible to investors through the ECF platform; (c) inform investors of any material adverse change to the issuer’s proposal as set out under paragraph 13.09; (d) ensure that the fundraising limits imposed on the issuer are not breached; and (e) ensure that the investment limits imposed on the investor are not breached.”

In preserving the markets integrity, the GRM 2020 specify the provisions in relation to trading operations (paragraph 13.32) and the promotion of market transparency, paragraph 13.33. It is the

requirement for the ECF operator to:

“(a) ensure trading information, both pre-trade and post-trade, is made publicly available on a timely or real-time basis, as the case may be; (b) make available in a comprehensive manner and on a timely basis, material information or changes to tradable securities; (c) ensure all information relating to trading arrangements and circumstances arising thereof where relevant, are made publicly available; and (d) ensure timely and accurate disclosure of all material information necessary for informed investing and take reasonable steps to ensure that all investors enjoy equal access to such information.”

There are many types of action which can be taken by the SC against the person who has committed a breach of guideline and practice note. It is based on any of the following types of sanctions (Section 354 of CMSA 2007):

“direct the person in breach to comply with, observe, enforce or give effect to such rules, provisions, written notice, condition or guideline;

- impose a penalty in proportion to the severity or gravity of the breach on the person in breach, but in any event not exceeding five hundred thousand ringgit;
- reprimand the person in breach;
- require the person in breach to take such steps as the Commission may direct to remedy the breach or to mitigate the effect of such breach, including making restitution to any other person aggrieved by such breach.”

If there is a breach of Part VI or guidelines issued pursuant to Part VI, the SC can:

“refuse to accept or consider any submission under Part VI;

- in the case of a promoter or a director of a corporation, in addition to the actions that may be taken under paragraphs (a) to (e) above, the following actions may be taken by the Commission:

- impose a moratorium on, or prohibit any trading of or any dealings in, the corporation's securities or in any other securities which the Commission thinks fit by the promoter or director or any person(s) connected with the promoter or director; or
- issue a public statement to that effect that in the Commission's opinion, the retention of office by the director is prejudicial to public interest."

Further under Section 362 (2) the SC has the power to:

"direct the person in breach to comply or observe the GRM 2020; impose penalty in proportion to the severity or gravity of the breach on the person in breach but not exceeding one million ringgit; to remedy or mitigate including making restitution to any other person(s) aggrieved by such breach; refusal to consider any submission and in the case of promoter or director of the company, or impose a moratorium or issue a public statement."

Indonesia

The equity crowdfunding industry was first recognized in Indonesia on 31 December 2018 as the Financial Services Authority (FSA) issued Regulation No. 37/POJK.04/2018 concerning crowdfunding services through information technology-based share offerings known as equity crowdfunding. Two years later, the Equity Crowdfunding 2018 Regulation was substituted by the FSA Regulation No. 57/POJK.04/2020 concerning securities offering through information technology-based crowdfunding services known as *securities crowdfunding* on 10 December 2020 and came into force on 11 December 2020. The relatively recent regulation aims to expand the object offered in crowdfunding services, from previously limited to "shares" (equity-based securities) to "securities," which cover not only equity-based securities but also debt-based securities and *sukuk*. Therefore, FSA Regulation No. 57/POJK.04/2020 uses the term "securities crowdfunding" rather than "equity crowdfunding".

In consideration of both, the FSA Regulation No. 37/POJK.04/2018 concerning equity crowdfunding and the FSA Regulation No. 57/

POJK.04/2020 concerning securities crowdfunding, place emphasis on Act No. 8 of 1995 concerning the capital market and Act No. 21 Year 2011 concerning the Financial Services Authority (FSA). Basically, both the Capital Market Act and the FSA Act Law do not clearly regulate ECF or SCF. Under Indonesian Law Number 11 Year 2012 concerning legal drafting, the hierarchy of legal source in Indonesia consists of: (i) 1945 Constitution; (ii) Decision of People's Consultative Assembly; (iii) Law/Government Regulation Constituting the Law; (iv) Government Regulation; (v) Presidential Regulation; (vi) Provincial Regulation; and (vii) Regency Regulation. Other regulations issued by an institution which is established based on the regulation shall be recognized and have legal binding power as long as the higher regulation order so. Under the FSA Act, FSA is an authority which has regulatory and supervisory duties towards financial services in the capital market sector. Based on this legal basis, the FSA attempted to issue FSA Regulation considering that the ECF has changed to securities crowdfunding.

Article 2 section (1) FSA Regulation concerning SCF states that, *“crowdfunding services are financial services activities in the capital market sector.”* Its section (2) mentions that a party carrying out crowdfunding activities is considered a party carrying out financial services activities in the capital market sector. Meanwhile, Article 1 Number 13 of the Capital Market Act states that “capital market” is an activity related to: (1) public offering and securities trading, (2) public companies related to the securities it issues, and (3) institutions and professions related to securities. Furthermore, *public offering*, in article 1 point 15 of the Capital Market Act, is defined as the activity of offering securities by an issuer to sell securities to the public based on the procedures stipulated in the Capital Market Act and its implementing regulations. Article 3 of the SCF FSA Regulation states that an offering of securities by an issuer through securities crowdfunding is not a public offering as referred to in the law concerning the capital market if:

- a. securities offerings are made through an operator that has obtained a license from the FSA;
- b. securities offering is conducted for a maximum period of 12 (twelve) months; and
- c. the total fund raised is a maximum of IDR 10,000,000,000 (ten billion rupiah).

Based on the regulations in the Capital Market Act, the FSA Act and the FSA Regulation of SCF, there are regulatory inconsistencies. On one hand, article 2 of SCF FSA Regulation considers crowdfunding services as financial activities in the capital market sectors, while it is not a public offering activity as referred in the Capital Market Act under several circumstances. However, both ECF and SCF FSA Regulation represent a better solution to provide the legal basis of ECF and/or SCF industry in Indonesia rather than no legal basis.

As previously discussed, the FSA Regulation No. 37/POJK.04/2018 concerning equity crowdfunding (ECF) has been substituted with FSA Regulation No. 57/POJK.04/2020 concerning securities crowdfunding (SCF). The alteration of ECF regulation to SCF regulation does not necessarily eliminate ECF activities. The new SCF Regulation aims to expand the scope and subject matter of crowdfunding services. In particular, the previous 2018 ECF Regulation covers only share-offering activities through crowdfunding services, while the 2020 SCF Regulation covers not only share-offering but also equity-based securities in a wider sense than *shares*, debt-based securities, and *sukuk*. Article 28 section (1) letter (a) of FSA Regulation No. 57/POJK.04/2020 concerning SCF states that equity-based securities shall be one of the securities offered through the crowdfunding services platform (Peraturan Otoritas Jasa Keuangan Nomor 57/POJK.04/2020 tentang Penawaran Efek Melalui Layanan Urut Dana Berbasis Teknologi Informasi, 2020).

The 2020 SCF FSA Regulation uses the term “securities-offering” rather than “share-offering”. Securities shall mean commercial paper such as debt instruments, commercial securities, shares, bonds, evidence of debt, collective investment units, futures contracts for securities, and securities derivatives (POJK No. 57/POJK.04/2020, Art. 1). The existence of “shares” in the definition of securities affirms that the new regulation does not eradicate ECF. Under the 2020 SCF FSA Regulation, it is logical to conclude that ECF is part of SCF.

There are three main actors in the ECF activity: (1) the Operator; (2) the Issuer; (3) the Investor. These actors have remained the same in the 2020 SCF FSA Regulation. However, there are several amendments to the parties’ requirements as the main purpose of the 2020 SCF FSA Regulation is to expand the parties’ scope in crowdfunding activities.

An operator shall mean “an Indonesian legal entity that provides, manages, and operates crowdfunding services” (FSA Regulation No. 57/POJK.04/2020, Art. 1 (5)). By “*Indonesian*,” it means its legal entity status must be established in and within Indonesian regulations. By “*legal entity*,” means the operator must be established to be either as LLC or cooperation (FSA Regulation No. 57/POJK.04/2020, Art. 8). Suppose the operator chooses to be LLC; in this case, the company may be established and owned by an Indonesian citizen or Indonesian legal entity. Other than that, a foreign citizen or foreign legal entity may become the shareholder or the owner of the operator company with a maximum of 49% of shares (FSA Regulation No. 57/POJK.04/2020, Art. 9). The LLC operator shall have a minimum paid-up capital of IDR2,500,000,000, at the time of filing the request of permission.

The new 2020 SCF FSA Regulation covers the new form of an operator, which is cooperation. Under its article 10, cooperation is limited to those who conduct business on services. Further, the cooperation operator shall have a minimum self-owned capital of IDR2,500,000,000 at the time of filing the request of permission. Within Indonesian company law, cooperation legal entity is regulated under Act No. 25 of 1992 concerning the cooperation. Under article 41 of the Cooperation Act, self-owned capital (of the cooperation) consists of principal savings, mandatory savings, reserved funds and grants. The explanation of article 11 2020 SCF FSA Regulation also mentions and refers to article 41 of 1992 Cooperation Act.

Under the 2020 SCF FSA Regulation, issuers shall be “an Indonesian business entity, both the legal entity one or the non-legal entity one”. Similar to the prior 2018 ECF FSA Regulation, the issuer shall be in the form of LLC, which is able to only issue and offer “shares”. However, in the new SCF regime, there is no clear regulation on whether foreign ownership of an issuer’s business entity could be regarded as issuer within the 2020 SCF FSA Regulation. The regulation only says that the issuer shall be an Indonesian business entity, and the issuer may be in any legal or non-legal form. By “legal entity” means in the form of LLC or cooperation and by “non-legal entity” means *commanditaire vennootschap (CV)*, firm, or partnership, both can be issuers of securities and participate in securities crowdfunding. Even more, as it has not been clearly regulated, it shall be possible for a sole proprietorship to be an issuer.

Speaking of the issuers' business entity, it might also cover the newly recognized one-man company formed under the Indonesian Law Number 11 Year 2020 concerning job creation law, which substituted some regulations including Law Number 40 Year 2007 concerning LLC. Under the 2007 Indonesian LLC regime, a limited company shall be established by a minimum of 2 (two) persons, while under the job creation law regime, it is possible to establish a limited company by only one person under certain circumstances. This new law has changed Indonesian perspective on company law and will most likely influence certain aspects of law.

An interesting issue of the 2020 SCF FSA Regulation is that under its article 4, the issuer is considered as a public company as referred in the capital market law if: (i) the shareholders of the issuer company are more than 300 parties; and (ii) the paid-up capital of the issuer reached more than IDR30,000,000,000 (thirty billion rupiahs). Meanwhile, under the 1995 Capital Market Act, article 1 point 22, a public company is a company which has a minimum of 300 shareholders and has a paid-up capital of IDR3,000,000,000 (three billion rupiahs) or any number of shareholders and the paid-up capital as determined by government regulations. To date, there has been no government regulation substituting the definition of a public company in Indonesia. Moreover, FSA Regulation Number 3/POJK.04/2021 concerning the administration of activities in the capital market field that came into force on 22 February 2021, article point 18 defines a public company as a company which has a minimum of 300 shareholders and a paid-up capital of IDR3,000,000,000 (three billion rupiahs) or any number as determined by the FSA. Thus, 2020 SCF FSA Regulation provides a different approach in determining a public company.

In carrying out crowdfunding activities, the issuer shall not be a business entity which is directly or indirectly controlled by a conglomeration; shall not be a public company or a subsidiary of a public company; and shall not be a business entity with a net worth of IDR10,000,000,000 (ten billion rupiahs) excluding land and building for business purposes. Once an issuer is willing to participate in crowdfunding, the issuer shall submit documents and information to the operator which varies depending on the securities issued by the issuer.

In summary, the following Table 1 shows a comparative analysis between the law of ECF in Malaysia and Indonesia.

Table 1

Law of ECF in Capital Markets – Malaysia vs Indonesia

Country	Governance	Process & Procedures	Investor	Issuer	Penalty	Compensation
Malaysia	*Securities Commission is the main regulator. *Companies Commission. *Recognized market operator. *Issuers. *Investors.	*Trading in a recognized market. *RMO must be established in Malaysia. *Issuer must be registered under the Companies Act 2026. *Sanctions for unregistered issuers/RMO. *Registered electronic facility *Each entity has its own responsibilities according to the law.	*Sophisticated – unlimited investments. *Angel – maximum RM500,000 within a 12-month period. *Retail – RM5,000 per issuer with a total amount of RM50,000 within a 12-month period.	*Private companies and limited liability partnership. *Raise/Collection limit <RM10 million.	*Directive. *Penalty < RM500,000. *Reprimand. *Refusal to accept submission. *Moratorium or, Prohibition of trading (promoter or director). * Issuance of public statement or, *Retention of office (promoter or director).	*Restitution. *Compensation.

(continued)

Country	Governance	Process & Procedures	Investor	Issuer	Penalty	Compensation
Indonesia	<p>*The term is altered to SCF rather than ECF.</p> <p>*Financial Services Authority is the main regulator of ECF/SCF.</p>	<p>*The process begins with an initial securities offering.</p> <p>*The Operator shall be a limited liability company (Law 40/2007) or, cooperation (Law No. 25/1992).</p> <p>*The securities offered are equity-based securities, debt-based securities, and <i>sukuk</i>.</p>	<p>*Investor could be individual or legal entity.</p> <p>*Investor with less than IDR500 million income may buy a maximum of 5% of securities from their yearly income.</p> <p>*Investor with more than IDR500 million income may buy a maximum of 10% of securities from their yearly income</p> <p>*The restriction is invalid for the legal entity investor or the experienced investor in a capital market.</p>	<p>*Issuers are business entities, both legal entities or other kinds of business entities (which enables non-legal entities to be issuers).</p> <p>*Issuer shall not be a business entity controlled by conglomerate, shall not be a public company, or a business entity with a net asset of more than IDR10 billion.</p>	<p>*Administrative sanction.</p> <p>*The forms of sanctions are: "(a) written warning; (b) penalty or, an obligation to pay an amount of money; (c) limitation of business activity; (d) freezing of business activity; (e) revocation of business license; (f) annulment of business approval; and/or (g) annulment of business registration."</p>	<p>*Compensation</p>

Based on the above discussion, it shows that the law is different between the two jurisdictions in terms of governance, process and procedures, types of investors, issuers, penalties and compensation.

Changes to Law and Regulations to Acclimatize to the Covid-19 Pandemic in Malaysia and Indonesia: Prospects and Challenges

The COVID-19 outbreak in ASEAN, has led to uncertainty in many economic sectors. The pandemic also triggered rapid capital outflows, leading to a fall in markets and a rapid decline in exchange rates across the region. Indonesia, the Philippines, Thailand and Viet Nam showed a quarter of their stock market value written off. The largest decline was in Viet Nam, where the index fell by 29.3 percent from 936.6 at the end of January to 662.5 at the end of March 2020. While in Malaysia by comparison, the decline was relatively limited to 11.8 percent (from 1513.1 at the end of January to 1350.9 at the end of March 2020). Additionally, there was also a drop in major currencies in the region, particularly the Thai baht, Indonesian rupiah (IDR) and Singapore dollar. The IDR experienced a significant depreciation, increasing from IDR13,662 per USD at the end of January to IDR16,367 at the end of March 2020, an increase of 19.8 percent (ASEAN Policy Brief, 2020).

In the United States, the Securities and Exchange Commission granted leeway to small businesses that had difficulty doing business during the COVID-19 pandemic. It was a temporary conditional relief to small businesses that had to meet their immediate financing needs through crowdfunding rules offer. This flexibility expedited the bidding process for eligible companies by providing exemption from certain rules regarding company bidding times and required financial statements. Through interim rules, a company in the United States was required to meet enhanced eligibility requirements. Next the company had to provide clear and tangible disclosure to investors about its reliance on the release. Enforcement of this exemption was applicable between the effective date of the interim regulation and 31 August 2020 (Securities and Exchange Commission, 2020).

In Malaysia, in view of the new norms, the digital economy has played a significant role. These new norms involve the public and private sectors as well as citizens who conduct activities and transactions that adopt and innovate digital technologies and services. It is closely

linked to the socio-economic function of increasing wealth creation, productivity and good quality of life (Malaysia Digital Economy Corporation [MDEC], 2021).

MDEC, a government agency has been aggressively pushing for small businesses and startups to take up alternative funding such as peer-to-peer (P2P) including equity crowdfunding campaigns to raise funds. Currently, the ECF business has managed to generate RM587 million collectively by over 1,600 SMEs. This involves a total of 21 ECF and P2P platforms registered with the SC. The local fintech industry is growing rapidly such as ECF and P2P financing as well as various fintech players including digital investment managers, digital asset exchange and real estate crowdfunding operators that are alternative markets in this era of new norms. According to Datuk Syed Zaid Albar, Chairman of the SC, the platform is growing rapidly to serve several MSME sectors including high technology, education, retail, F&B and consumer products. This alternative business platform has succeeded in attracting many new investors especially young investors aged 35 years and below (Securities Commission, 2019). The Malaysian Mutual Investment Fund (MyCIF) was launched by the Malaysian government with an allocation of RM50 million. The fund aims to help fund start-ups and SMEs by co-investing on a one to four basis in campaigns listed on ECF and P2P platforms. Further, to boost social enterprise fundraising through P2P financing platforms another RM10 million was allocated to MyCIF under Budget 2020.

Consequently, in response to the pandemic, the SC of Malaysia further increased the fundraising of ECF limit to RM10 million from the initial RM5 million limit in April 2020. The move was to boost the interest of micro, small and medium enterprises to take advantage of alternative fundraising channels. These changes to enable ECF schemes and peer financing (P2P) to operate secondary trading were immediately effected. Furthermore, the Malaysian Mutual Investment Fund, which is administered by the SC, provided additional liquidity into alternative fundraising spaces. The initiative increased its funding match ratio from 1: 4 to 1: 2 for ECF and P2P campaigns. This was due to high demand from industries to accelerate digital transformation. In addition, it increased diversification in offering online products and services to investors. The aforementioned agenda was seen by the SC to add a significant surge in newly opened online trading accounts. (SC, 2020).

During the presentation of Budget 2021, the Malaysian Minister of Finance announced that tax incentives for investment in ECF would be provided. Income tax exemption on aggregate income equivalent to 50 percent of total investments are granted to individual investors who trade through the ECF platform registered with the SC. The tax exemption is limited to RM50,000 for each year of assessment amount. Further, the deductible amount is limited to 10 percent of the aggregate income for that year of assessment with other conditions to be met. The exemption is applicable to investments made from 1 January 2021 to 31 December 2023 (Ministry of Finance, 2020).

In terms of the prospect of ECF business during the pandemic, it was reported by the SC (SC Annual Report, 2020) that in 2020, the increase in total capital raised through ECF in Malaysia was 457 percent to RM127.73 million as compared to the capital raised in 2019 which only totalled RM22.92 million. 78 issuers had successfully raised funds through 80 campaigns in 2019 with two issuers raising funds twice a year. The SC stated that the majority of issuers were based in Kuala Lumpur or Selangor and 60 percent were technology-focused publishers. In 2020, the total fundraising was even greater with 84 percent of campaigns earning more than RM500,000. A total of RM199.23 million has been raised by ECF since 2016, as well as benefiting 150 issuers through 159 successful campaigns. In 2020, the top three sectors in terms of total capital raised were other services activities with RM38.88 million or 31 percent of total capital raised. The professional, scientific and technical activities sectors netted RM19.96 million (16%), while information and communication earned RM18.27 million (14%) (SC Annual Report, 2020).

Recently, to elevate ECF businesses, amendments to Schedules 6 and 7 of the CMSA 2007 were implemented on July 1, 2021. This has expanded sophisticated investors, including, among others, individuals with investments of RM1 million in capital market products, either individually or through joint accounts with their spouses; chief executive officers and directors of persons licensed or registered under CMSA 2007; and companies that manage their related company funds with assets in excess of RM10 million. This effort will enable issuers to take advantage of a larger pool of sophisticated investors and encourage many investors to grow their investment options.

Additionally, the amendments to Tables 6 and 7 has authorized Bursa Malaysia to conduct the registration of the ACE Market prospectus

with effect from 1 January 2022. Therefore, Bursa Malaysia has become a one-stop center for all approvals in relation to ACE Market listings.

Meanwhile, Schedule 5 of the CMSA has been amended to do away with SC approval on certain corporate proposals which include the following: “(a) initial exchange offering of digital assets through a recognized market operator; and (b) an initial public offering (IPO) or cross-listing of shares of a public company or listed corporation on a stock exchange outside Malaysia.”

The Capital Markets and Services (Amendment) Regulations 2021, came into force on 1 July 2021 and inserted Schedule 3 [Paragraph 8(1)(b)] in relation to fees in respect of a recognized market operator as shown in Table 2.

Table 2

Fees in Respect of a Recognized Market Operator

No	Activity	Fees
	General trading	
1	Application for registration as a recognized market operator under subsection 34(1) of the Act.	RM5,000.00
2.	Annual fees payable by a recognized market operator.	RM50,000.00 payable on a date determined by the Commission Fund-raising Exercise.
3.	Fees in respect of fund-raising exercise through an initial exchange offering.	RM20,000.00+0.05% of the total amount to be raised.
4.	Fees in respect of fund-raising exercise other than an initial exchange offering.	0.05% of the total amount raised or financed through the platform during the year.
5.	Lodgement of white paper.	RM500.00
6.	Fees in respect of trading of securities or derivatives in a recognized market.	0.01% of the total amount of sale and purchase of securities or derivatives transactions effected on the platform operated by the recognized market operator for that year.

After the issuance of the SCF 2020 FSA Regulation, the development of ECF is expected to increase in Indonesia. Substitution of the crowdfunding object which was previously limited to “shares” of the LLC to “securities” in a broader sense, could lead to more actors participating as issuers. In order to survive during COVID-19, a huge number of people viewed SCF as an alternative funding to grow their business, as the main target of SCF are start-up companies and the SMEs. Besides, the requirements of “issuer” from only available to LLCs has been extended to any legal or non-legal form of business entity. In this regard, issuer business entity of non-LLC can issue securities other than “shares” to investors such as debt-based securities or *sukuk*.

The demographic bonus in Indonesia would also constitute an opportunity to the development of SCF in Indonesia. The Indonesian Ministry of National Development Planning asserted that between 2030 and 2040, Indonesia will undergo a demographic bonus as the productive-age population (15–64 years) will become a larger number than those who are in the non-productive age. Nevertheless, this particular period also represents another challenge to Indonesia in terms of related skills and education of its manpower (Afandi, 2017). The more skilled and educated its productive population, the more developed Indonesia will become, including the development of ECF as an alternative financial services in Indonesia.

Besides, the rapid development of technology and innovation leading to rapid growth in financial technology will also create prospects as well as challenges to ECF in Indonesia. On the one hand, the use of technology has increased tremendously since the pandemic, especially among students, the younger generation as compared to the older generation. Eventually, the society will come to grips with current technological developments such as the internet, social media, blockchain, financial services, including SCF. By then some could become investors and also participate as company issuers. On the other hand, responding to the swift developments in technology has not been easy for the government. As a civil law country that should have a written legal basis for certain activities, regulation is somewhat lagging behind in comparison to developments in business and technology. Furthermore, the lack of cyberlaws, data protection and privacy laws pose a huge challenge for Indonesia in terms of criminal action and legal violation of rights to privacy. Besides that, business

risks could also constitute a challenge. The most important aspect of financial services is societal trust. Business risks play a huge role in determining the trust of society. The risk of default, losses, breach of fiduciary duty, non-performing loans, liquidity, cyber-attacks are among some of the business risks that could influence society's trust in crowdfunding services.

Another issue of concern is the existence of cybercrimes in internet-based transactions and whether the law or the enforcement authority, SC or OJK are competent to combat cybercrime in relation to ECF. In an ECF business, issuers can choose to sell a share of their company to investors. Thus, some investors who are also part of this ownership, expect to have a say and want to participate in the management of the business. This is an added value to a team seeking expert guidance and advice. However, this action can disrupt direction if it takes the business in a different direction than what the original owner intended. Next, crowdfunding is not immune to fraud (Sadzius, 2001). Scammers are always looking for opportunities to deceive the public on the internet. Fake sites always appear on the internet by copying legitimate websites and funds are diverted to scammers especially charity organizations and ECF sectors. The question arises whether the offences as stated in the CMSA 2007 (section 175 – 181 and section 188) and the ECF FSA Regulations to stop the *modus operandi* used by scammers to manipulate the stock markets are adequate? These are some of the common challenges faced by regulators in Malaysia and Indonesia.

RECOMMENDATION AND CONCLUSION

The industry of ECF in Indonesia is expected to grow larger after the substitution of the ECF FSA Regulation by the FSA Regulation Number 57/POJK.04/2020 concerning securities crowdfunding. The new 2020 SCF FSA Regulation covers business entities other than LLCs to participate in the SCF as the issuer. Furthermore, the new regulation covers securities other than “shares/stocks” of LLCs. It shall be a basis for future-prospects in the growth of SCF and in supporting SMEs in Indonesia. The demographic bonus in Indonesia, the prevalence of SMEs and start-up companies, and the massive use of technology represent opportunities to execute SCF activities in Indonesia.

Nevertheless, inconsistent regulations could constitute challenges to its implementation. Even though, the *lex superior derogat legi inferior* principle may take place to settle problems, certainty and consistency in regulations constitute a better regulatory basis. The rapid development of technology and innovation, the lack of a legal basis in data protection in Indonesia, and business risks in the implementation of SCF, especially for debt-based securities and *sukuk* could pose challenges to the implementation of ECF or SCF in Indonesia. In this regard, the government could consider amending the capital market act and issuance of the data protection act.

In the case of Malaysia, the findings of the study indicated that a breach in any of the provision in the GRM 2020 related to ECF will amount to several actions as prescribed in section 354 and 356 of the CMSA 2007. These two sections is under the Administrative and Civil Actions Part XI. In the GRM 2020 there is no provisions which describe the offences of cybercrimes despite ECF trading being conducted on internet platforms. Although, there are provisions in the CMSA 2007, Part V concerning market misconduct and prohibited conduct, these provisions are applicable to approved markets where business entities are public companies. Whether recognized markets such as ECF markets where only locally incorporated private companies and limited liability partnerships (excluding exempt private companies) are allowed to be hosted on the ECF platform, is not covered in Part V of the CMSA 2007.

In conclusion, this Covid 19 pandemic has provided a significant boost to digitization in general and digital business models in particular. This is evident in emerging flexible companies, which can switch quickly to new markets and products, to gain advantage over specialized high-volume manufacturers when there is a need to respond to exogenous shocks such as an epidemic. The economic benefits that conventionally mandated efforts to pursue economies of scale and the transition to a low-wage nation are now being reconsidered. Thus, in response to changes in the business world, the existence of laws governing the ECF in both countries is seen as a proactive agenda by both governments. Although, in the current situation both countries impose registration requirements on issuers and RMOs in the host country, this will not prevent foreign companies from investing in ECF by complying with the laws of the host country.

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